In the

Supreme Court of the United States

BILL BUTLER

v.

DAIMLERCHRYSLER CORPORATION AND
COMPUWARE CORPORATION D/B/A
PROFESSIONAL SERVICES

On Petition For Writ of Certiorari

To The UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL BUTLER
IN PRO SE
C/O JACKIE LeMON
28675 KARAM DRIVE
MADISON HEIGHTS, MI 48071

IN THE FEDERAL COURT OF APPEALS

The federal court of appeals affirmed with the federal district court in dismissing the case due to the doctrine Res Judicata.

Questions Presented for Review.

Why did the Res Judicata overrule Collateral Estoppel and barred the plaintiff from federal court proceedings?

IN THE FEDERAL JUDICIAL COUNCIL

Since Judge Feikens and Judge Morgan didn't address any of the plaintiff's topics he brought up in the June 29, 2004 oral argument the plaintiff filed a complaint of judicial misconduct with the executive of the sixth circuit. The Chief judge ruled their were no judicial misconduct due to the merits in the case. The plaintiff went on to petition the judicial in this matter of judicial misconduct.

Questions Presented for Review.

What do the merits of this case have to do with two federal judge's misconduct in not discussing the topics brought to their attention by the plaintiff in oral argument, both in the chief judge and judicial council decision?

IN FEDERAL DISTRICT COURT

On June 29, 2004 the plaintiff/defendants was invited to appear in front ofJudge Morgan for an oral argument which the judge was to write a reportand recommendation to district Judge Feikens. The case was dismissed due to the doctrine res judicata.The plaintiff was allowed to cite a case similar to his own, he discussed the doctrine of Collateral Estoppel and spoke to Judge Morgan about his inability to obtain employment because of this injustice.

Questions Presented for Review

Why did the Res Judicata overrule Collateral Estoppel and barred the plaintiff from federal court proceedings?

Why didn't Judge Morgan discuss the case the plaintiff was allowed to cite during oral argument in her report?

Why didn't Judge Morgan discuss the doctrine of Collateral Estoppel in her report?

Why didn't Judge Morgan discuss the plaintiff's issue of not being able to obtain employment because of this injustice?

IN MICHIGAN SUPREME COURT

The plaintiff submitted his paper work to the court and motion the court for immediate consideration. He was granted immediate

consideration within 2 days without opposing motion fro the defendants. He then was denial his leave from the court of appeals because the Supreme Court stated they were not persuaded that this court should review these questions.

Questions Presented for Review

Why did the same paperwork, that granted the plaintiff immediate consideration with in just 2 days, did not persuaded the Supreme Court to even address the plaintiff's questions from the Court of Appeals decision?

IN MICHIGAN COURT OF APPEALS

The court of appeals affirm with the lower court stating the plaintiff provide no evidence. The court also stated, challenging the official's credibility does not create admissible evidence in support of plaintiff's claim.

Questions for Review

Why didn't the court of appeals even address the plaintiff's evidence the private investigator and newspaper reports?

Why didn't the Court of Appeals order a new telephone deposition

of the witness B. Hurley to find out the true?

Did the witness B. Hurley obstruct justice?

What are the perils for lying under oath in the court of law twice?

Did the witness B. Hurley receive any such perils?

IN MICHIGAN OAKLAND COUNTY CIRCUIT COURT

The plaintiff's evidence, both his private investigator and newspaper reports were ruled by Judge Kuhn if admissible it does not support the plaintiff's allegation against the defendant companies, stating that they received different information the the plaintiff's prospective employers.Judge Kuhn continues stating that B.Hurley telephone records does not prove that she spoke to anyone or what the content of any conversation might have been.

Questions Presented for review

Why would Judge Kuhn rule the plaintiff's evidence in admissible

Why would Judge Kuhn state the defendants companies pick and choose what they were say about the plaintiff?

Why didn't Judge Kuhn order a new telephone deposition with the witness B.Hurley after receiving her telephone records?

Did the witness B. Hurley obstruct justice in this case?

IN THE STATE OF MICHIGAN 50TH DISTRICT

Due to a low mediation award of $1000 (based on the affidavit provided by the witness B.Hurkey her first lie) Judge Kuhn remanded the case to the district court. A trial was scheduled but the day of the trial no jury available. Judge Brown sends the case back to Judge Kuhn.

Questions Presented for review

Why was this case sent to district court against Michigan civil code 11.53?

TABLE OF CONTENTS

PARTIES TO THE PROCEEDINGS

Petitioner is Bill Butler, a mechanical engineer, a Michigan resident that has been for[illegible] on to jobless/homeless list.

Respondents are DaimlerChrysler Corporation and Compuware Corporation doing business as Professional services.

Attorneys for the respondents:

For DaimlerChrysler Corporation
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(248) 593-6400

For Compuware Corporation d/b/a
Professional Services
JOHN J. RONAYNE, III (P23519)
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Bernardi, Ronayne & Glusac
A Professional Corporation
1058 Maple Street, Suite 100
Plymouth, Mi 48170
(734) 416-1780

JURISTICTION

United States Court of Appeals For The Sixth Circuit Order

Filed on July 28, 2005 the district court's order is therefore

affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

TABLE OF AUTHORITIES

FRANK B. HALL & CO., ET AL., Appellants v. LARRY W. BUCK, Appellee

No: C14-82-234-CV

COURT OF APPEALS OF TEXAS, Fourteenth District, Houston

678 S.W.2d 612; 1984 Tex. App. LEXIS 5886

July 26, 1984

STATEMENT OF THE CASE

Work references are the most important aspect of anyone's job search, from baby sitting to the chief justice of the United States of America. If you state on your resume that you work for a certain company/companies and they both state that they have no record of your employment. That's makes you a liar and immediately you chances of obtaining employment with company at that time or any time in the future a simply gone... They just don't want anything to do with you. If you try to explain you situation to the people you interview with the look at you and wonder what you did for any company to do this to you. **I did nothing.** The result is a jobless/homeless mechanical engineer with no end in sight.

REASONS FOR GRANTING THE WRIT

Briefly let's step back in this case and see what we have:

1. A mechanical engineer that against all odds receives his degree...one year going night school to get college prep classes, two years day school to receive his associate's degree and six years night school to receive his bachelor's degree
2. Two companies thru their wreckless disregard for the truth state, no record of that employee.
3. A witness that lied under oath twice.
4. A circuit court judge that states the defendants companies would have told the plaintiff's potential employer something different that what his private investigator and newspaper reporter learned.
5. A state court of appeal that did not even consider the plaintiff's private investigator and newspaper reporter and rule the plaintiff provide no evidence.
6. The state supreme court that granted the plaintiff immediate consideration in two days and the stated that they were not persuaded that there court should address the plaintiff's questions.

7. A federal magistrate that did not include what the plaintiff said in her court during oral argument.

8. A judicial council that states there was no judicial misconduct.

9. A federal district judge that dismisses the case.

10. A federal court of appeals that affirms with the district judge.

11. This wreckless disregard for the truth and lawsuit has left the plaintiff/petitioner unemployable. No company will ever consider him now for employment.

CONCLUSION

Bill Butler, petitioner has mailed this petition on September 7 2005.

Bill Butler

INDEX TO APPENDIX

No. 042155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILL BUTLER,	)	
	)	
Plaintiff-appellant	)	ORDER
	)	
v.	)	
	)	
CHRYSLER CORPORATION;	)	
COMPUWARE CORPORATION,	)	
doing business as Professional Services	)	

Before: BATCHELDER, GIBBONS and MCKEAGUE, Circuit

Bill Butler, a Michigan resident , appeals pro se a district court order dismissing a complaint he filed on the ground that it was barred by res judicata. This case has been referred to a panel of the court to Rule 34(j)(11), rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App.P.34(a)

Butler filed his complaint, alleging that it was a "civil rights' action. According to the complaint, Butler was employed by the defendants as a mechanical engineer until hid firing in 1998. Subsequently, when seeking new

employment, he alleged that defendants told prospective employers that he never worked there, thus preventing him from obtaining a new job.

Defendants moved for dismissal of the complaint, arguing that it was barred by res judicata because Butler had unsuccessfully pursued a defamation action in the Michigan state courts, which showed that they had been granted judgment because Butler provided no evidence that any prospective employer had failed to hire him based on the defendants' refusal to acknowledge his employment. Butler pursued this case through the state court system to Michigan Supreme Court.

This complaint was referred to a magistrate judge who heard oral argument on the motion to dismiss and Butler's response. The magistrate judge's report and recommendation, after first stating that the motion to dismiss would be converted to a motion for summary judgment, recommended that the motion to dismiss be granted. the district court adopted this recommendation over Butler's objections This appeal followed.

Initially, it is noted that although Butler characterized this as a civil rights action , the named defendants could not be sue under 42 U.S.C. 1983, as neither is a state actor. *Polk County v. Dodson*, 454 U.S. 321,318-19 (1981). The complaint also contained no allegations of employment discrimination on the basis of Butler's membership in a protected group, nor any indication that he had filed a charge with the E.E.O.C. and received a notice of the right to sue, in order to file a complaint of employment discrimination. *Puckett v. Tenn Eastman Co.*, 889 F.d 1481,1486 (6th Cir. 1989).

Moreover, even construing the complaint liberally as a diversity deformation claim it was properly found barred by res judicata. Whether defendants' motion was construed as one for dismissal or summary judgment, decisions relying on res judicata are review de novo. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573,582 (6th Cir 1994). This complaint was barred by res judicata because Butler had filed a prior action which was decided on its merits, raising the same issue against the same defendants *Reithmiller v.*

Blue Cross & Blue Shield of Mich., 824 F.2d 510, 511 (6th Cir, 1987). Although Butler does not believe that his claim was fairly addressed by the state court, an appeal from a unfavorable result in state court is not available in federal district court. *Patmon v.Michigan Supreme Court*, 224 F.3d 504, 510 (6th Cir.2000).

The district court's order is therefore affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BT ORDER OF THE COURT

s/_____

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

KENTUCKY-MICHIGAN-OHIO-TENNESSEE

In re: • No. 04-6-351-50

Complaint of Judicial Misconduct

ORDER

A complaint of judicial misconduct having been filed by Bill Butler against the Honorable John Feikens, United States District Judge for the Eastern District of Michigan, and the Honorable Virginia M. Morgan, United States magistrate Judge for the Eastern District of Michigan, pursuant to 28 U.S. C. 351 and the complaint having been review by the Chief Judge of the circuit pursuant to 28 U. S. C. 352.

It is ORDERED that, for the reasons contain in the attached memorandum, the complaint shall be dismissed pursuant to 28 U. S. C. 352(b)(1)(A)(ii) and Rule 4(c)(2) of the rules of Governing Complaints of Judicial misconduct or Disability.

s/_____

Danny J Boggs

Chief Judge

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

KENTUCKY-MICHIGAN-OHIO-TENNESSEE

In re:

Complaint of Judicial Misconduct No. 04-6-351-50

MEMORANDUM

This complaint was filed with the Judicial Council of the Sixth Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, P. L> 96-458, as amended by the Judicial Improvements Act of 2002, Pub. L. No. 107-203, and the Rules Governing Complaints of Judicial Misconduct adopted by the Judicial Council of the Sixth Circuit. The Act and Rules provide for the initial screening of complaints by the Chief judge of the circuit. the chief judge may dismiss the a complaint:

(a) that is frivolous; that directly relates to the merits of a decision or procedural ruling of a judge:

(b) that fails to allege conduct or a condition of a judge or magistrate which is prejudicial to the effective and expeditious administration of the business of the courts.

This complaint of judicial misconduct filed by a pro se litigant in a civil case against the district judge and magistrate judge who were assign to his case. The gravamen of his complaint is that the magistrate judge's report and recommendation and the district judge's order overruling his objection and adopting the magistrate judge's report and recommendation ignored the arguments that he advanced in support of his view of his case.

Based on the foregoing, it is clear that the complaint is directly related to the decisions or procedural rulings of the judges who are the subject of the complaints and therefore is subject to dismissal. See *In re Complaint of judicial Misconduct*, 858 F.2ddd 331 (6th Cir.1988).

s/_____

Danny Boggs, Chief Judge

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

KENTUCKY-MICHIGAN-OHIO-TENNESSEE

In re: * No. 04-6-351-50

Complaint of Judicial Misconduct

ORDER

On Petition to Review an Order of Dismissal

Pursuant to 28 U. S. C. 357 and rule 5 of the Judicial Council of the Sixth Circuit Governing Complaints of Judicial Misconduct or Disability, the complainant has filed a petition for review of an order entered by Chief Judge on January 24, 2005 dismissing the complainant's complaint of judicial misconduct pursuant to 28 U. S. C. 352(b)(1)(A)(ii) and rule 4(c)(2) of the Rules Governing Complaints of Judicial Misconduct or Disability.

The petition for review was considered by the Judicial Council of the Sixth Circuit * pursuant to Rule 8(c) of the Rules Governing Complaints of Judicial Misconduct or Disability at a meeting of the council held on June 26, 2005. All members of the council who

were present voted for affirmance of the dismissal of the complaint, the order of dismissal will be affirmed. It is therefore ORDERED that the Chief Judge's order of dismissal of the complaint be affirmed pursuant to 28 U. S. C. 357 and Rule 8 of the Rules Governing Complaints of Judicial Misconduct or Disability.

s/_____

Boyce F. Martin, Jr.

Acting Chief Judge

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*Chief Circuit Danny J. Boggs took no part in the consideration of the petition for review or entry of this order.

UNTIED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILL BUTLER,

Plaintiff,

Civil No. 04-71173
Hon. John Feikens

v.

DIAMLERCHRYSLER CORP.,and
COMPUWARE CORP. d/b/a
Professional Services,

Defendants,

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT

AND RECOMMENDATION

The court having reviewed the Magistrate Judge's Report and Recommendation, filed on 7/30/2004, the objections by the plaintiff filed on 8/11/2004, and defendant DaimlerChrysler's Response to the Objections filed on 8/11/2004.

IT IS ORDERED that the report and recommendation is accepted and defendants' Joint Motion to dismiss id granted and the case is dismissed.

s/_____

John Feikens

United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

BILL BUTLER,

Plaintiff, CIVIL ACTION NO.

DAIMLERCHRYSLER CORP., 04 CV 71173 DT

and COMPUWARE CORP., d/b/a

PROFESSIONAL SERVICES,

Defendants

DRITRICT JUDGE JOHN FEIKENS

MAGISTRATE JUDGE VIRGINIA M. MORGAN.

REPORT AND RECOMMENDATION

Introduction

Defendants DaimlerChrysler Corporation ("DaimlerChrysler") and Compuware Corporation d/b/a Professional Services ("Compuware") have filed this joint motion to dismiss pursuant to Fed.R.Civ.P. 12 (b)(6). The motion has been referred to this court. Oral argument was heard on June 28, 2004. Defendants argue that Plaintiff Bill Butler's claim is precluded by

the doctrine of res judicata, based on prior judgments in state courts from the circuit, appellate and supreme courts of Michigan. Plaintiff filed a response to defendants' motion. Defendants filed "objections' to Plaintiff's response. For the reason stated in this Report, it is recommended that the Motion be granted and the case dismissed.

BACKGROUND

Plaintiff has brought this suit alleging civil rights violations under 42 U. S. C. 1983, specifically with regard to his employment history. Plaintiff had been in the employ of MIS international ("MIS"), a contract services agency. MIS was later purchased by Compuware and renamed "Professional Services". Plaintiff was placed at then-Chrysler Corporation1 as a mechanical design engineer. MIS terminated Plaintiff in October 1998. Plaintiff subsequently began to search for new employment. Plaintiff claims, that while in the process, Defendants knowingly defamed Plaintiff and hindered his employment search by refusing to acknowledge employment at either entity.

Plaintiff brought defamation suit against both DiamlerChrysler and Compuware in Oakland County Circuit Court. On December 13, 2000 summary disposition was granted to

Defendants with regard to Plaintiff's original complaint, with leave to amend. Plaintiff did so amend and summary disposition was granted as to the as to the amended complaint on April 29, 2002.

Plaintiff appealed as of right to Michigan Court of Appeals. On December 4, 2003, the Court of Appeals affirmed the trial court stating, "A motion under MCR 2.116 (C)(10) (for summary disposition) tests the factual sufficiency of the complaint... Plaintiff failed to provide evidence to support his claim." (Citation Omitted) Plaintiff then petitioned the Michigan Supreme Court for immediate consideration and the application for leave to appeal the judgment of the Court of Appeals. On February 27, 2004, immediate consideration was granted and the application for leave to appeal was denied.

Failing to have succeeded on any of his claims in the Michigan courts, Plaintiff brought suit on March 30, 2004 in this federal court. Plaintiff alleges, without statutory reference, violation of his civil rights with respect to his employment history, claiming the aforementioned failure to properly report his employment history. On April 16, 2004, Defendants moved to dismiss pursuant

to Fed.R.Civ.P.12 (b) (6) alleging that plaintiff's suit precluded by the doctrine of *res judicata*.

ANALYSIS

Defendants seek dismissal of the instant action based on Fed.R.Civ.P.12 (b)(6), alleging Plaintiff has failed " to state a claim upon which relief can be granted," due to the doctrine of *res judicata*. "If *res judicata* is raised as an affirmative defense ....rule 12 (b) and rule 12 (c) both provide that the motion will be treated as one for summary judgment." Wright,Miller &Kane, Federal Practice and procedure: Civil 3d 2735.3 (1998). Fed.R.P. 12 (b) states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are present to an not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 56(b) states the right of the "party against whom a claim...is asserted" to for summary judgment. Federal Rule of Civil Procedure 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled a judgment as a matter of law.

The standard for showing such a required absence of any issue of material fact is set forth in Federal Rule of Civil Procedure 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for .

The standard of showing such an absence of a "genuine issue of material fact" set forth Above in Fed R.Civ.P 56(e) has been summarized by the Sixth circuit. Haverstick Enterprises,Inc. v. Financial Federal Credit, Inc., 32 F.3d 989.993 (6th Cir 1994). The court noted "On summary judgment motions, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the parties opposing the motion." Haverstick Enterprises,Inc. at 993 citing Matsushita Electric Industrial Co.,Ltd v. Zenith Radio Corp., 475 us 574, 587-88, 106 S.Ct.1348,1356,89 Led.2d 538 (1986). The court also noted, "However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial" Id. The court further clarifies the standard, stating "Summary Judgment must be entered against a party who failed to provide sufficient

evidence in support of an essential element of that party's case. Haverstick Enterprises,Inc at 993 citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548,2552,91 L.Ed.2d.265 (1986).

In determining whether summary judgment motion can be granted to a party alleging res judicata, the Supreme Court has charted this route: "Under the Doctrine of res judicata, a judgement on the merits in a prior suit bars a second suit involving the same parties or their privies based on the sane cause of action." Parklane Hosiery Co v. Shore, 439 U.S. 322, 327, 99 S.Ct. 645,649 (1979), citing J. Moore, Federal Practice 10.405[1],pp. 622-624 (2d ed.1974). When, as in this action, the prior suit was adjudicated by the state courts and the related, succeeding case id is a federal action, case law interpreting the Full Faith and Credit Clause of the Constitution must be followed. the codified language of the ststue "reads in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.

28 U.S.C. 1738 quoted by Migra v. Warren City school Dist Bd. of Educ., 465 U.S. 75,80, 104 S.Ct. 892, 896 (1984). It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." Migra at 81 citing Allen v. McCurry, 449 U.S. 90, 101S.Ct.411 (1980).

The Supreme Court has specifically addressed, however, the question of whether the law3 of Allen cited above by Migra is relevant to 42 U.S.C. 1983 actions. Migra dealt with the question of whether the Allen rule was applicable to claims, specifically civil rights questions, where the Federal government is entrusted with the power to determine whether such state civil rights law is unconstitutional. In Allen, the court consider whether 42 U.S.C. 1983 modified the operation of 1738 so that a state-court judgment was to receive less than normal preclusive effect in a suit brought in federal court under 1983." Migra at 81. The court explained, "[n]othing in the language of 1983 remotly expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. 1738... Migra at 82 citing Allen 449 U.S.

at 97, 101 S.Ct., at 416. "Allen therefore made clear that issues actually litigated in a stste-court proceeding are entitled to the same preclusive effect in a subsequent federal 1983 suit as they enjoy in the courts of the State where the judgment was rendered. Migra at 83. While Allen ruled that issue preclusive effect can be given to state courts judgments in 1983 cases, Migra extended the rule to include the effect of claim preclusion as well. "[W]e must reject the view that 1983 prevents the judgment in the petitioner's state-court proceeding from creating a claim preclusion bar in this case.' Id at 84.

Migra also notes that a federal claim that could have been brought by a clamant in the prior state court suit is afforded the same preclusive effect as if it had been included. "Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court her claims and then turn to federal court for adjudication of her federal claims." Id. at 85.

Plaintiff did not specifically raise 42 U.S.C. 1983 as the statue under which his claim is brought. However, Plaintiff explicitly states "his civil rights have been violated' as well as

noting on the "Civil Cover" sheet " Federal Question" jurisdiction, with "Employment"selected under the "Civil Rights" category.

Since 1983 claims have the same preclusive effect afforded other claims under 28 U.S.C 1738 under the rulings of Allen and Migra, Michigan's res judicata case law must be applied to the instant action. in Michigan, "[t]here are three prerequisites to the application of the res judicata doctrine: (1) there must have been a prior decision on the merits; (2) the issues must have been resolved in the first action, either because they were actually litigated or because they might have been presented in the first action; and (3) both actions must be between the same parties or their privies."VanDeventer v. Michigan National Bank, 432 N.W.2d 338, 342 (Mich.App. 1988) citing Sloan v. Madison Heights, 425 Mich 288, 295, 389 N.W.2d 418 (1986). Defendant also notes in its briefs the additional rule in VanDeventer that " Michigan courts apply the res judicata doctrine broadly so as to bar claims that were actually litigated as wellas claims arising out of the same transaction which a plaintiff could have brought, but did not." VanDeventer at 342 citing Gose v. Monroe Auto Equipment Co. 409 Mich. 147, 169, 294N.W. 2d 165 (1980).

Applying the Sloan standard, there has been a "prior decision on the merits" in this matter. Plaintiff's first complaint was decided in Defendants' favor on a motion for summary disposition. The order was granted pursuant to MCR 2.116 (C)(10). MCR 2.116 (C)(10). states:

> (C) The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> (10) Except as to the amount of damages, there is not genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of the law.

In Michigan, "summary judgment the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of *res judicata* ." Capital Mortg. Corp.v.Coopers & Lybrand, 369 N.W. 2d 922,924 (Mich. App.1985) citing City of Detroit v. Nortown Theater Inc. 323 N.W>.2d 411, (Mich. App. 1982). As noted the Michigan Court of Appeals affirmed the decision of Oakland County Circuit Court on December 4, 2003.

The Michigan Supreme Court denied leave to appeal on February 27, 2004.

The second prerequisite needed to apply the doctrine of res judicata has been satisfied as well. Plaintiff has brought no allegations which were not litigated in the first action. The claim is based on the same facts and allegations, specifically the Defendants companies defamed the Plaintiff during his employment search. While Plaintiff brings this claim under the auspices of a 1983 claim separate from his state court defamation claim, it is well established that such an action is held to the same standard for claim preclusive purposes. Migra, supra. Plaintiff has alleged that one of the bases for his federal claim is thst Michigan state courts "in his case were incompetent." Plaintiff's usage of "incompetent" however is incorrect and not valid challenge to the court's competency. The "competency" of the proceedings refers not to the conduct of the court nor the outcome of the case nor Plaintiff allegations of misconduct, but rather the appropriateness of the court jurisdiction. Plaintiff also alleges "incompetency" of the court in relation to what could be perceived as Plaintiff's own errors, claiming certain

depositions were not taken prior to the first action. This argument is also without merit.

Third both the state court actions and instant federal claim are between the same parties, having the same Plaintiff and Defendants. Based on the doctrine of res judicata, all prerequisites for a bar to Plaintiff's federal claim have now been satisfied. Defendants' motion pursuant to Fed.R.Civ.P.12 (b)(6) should be granted.

CONCLUSION

Accordingly, it is recommended that Defendants' Joint Motion to Dismiss be granted and the case be dismissed.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for 28 U. S.C. 636 (b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a wavier of any further right to appeal. Thomas v.Arn 474 U.S. 140(1985); Howard v. Secretary of HHS, 932 F.2d 505, 508 (6th Cir.1991); United States v. Walters, 638 F.2d947,949-50 (6th Cir.1981). The filing of objections which raise

some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991); Smith v Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373, (6th Cir.1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

s/_____

VIRGINIA M. MORGAN

UNITED STATES MAGISTRATE JUDGE

Order

Entered: February 27, 2004

Michigan Supreme Court
Lansing, Michigan

125344 & (48)

Bill Butler,
Plaintiff-Appellant,

v

CHRYSLER CORPORATION and
COMPUWARE CORPORATION
d/b/a Professional Services,
Defendants-Appellees

Maura D. Corrigan
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 125344
COA: 241413
OAKLAND
CC: 00-022028-CL

_____/

On order of the Court, the motion for immediate consideration and the application for leave to appeal the December 4, 2003 judgment of the Court of Appeals are considered. Immediate consideration is GRANTED. The application for leave to appeal is DENIED, because we are not persuaded that the questions presented should be reviewed by this court.

s/_____

Corbin R. Davis
Clerk of the Michigan Supreme Court

Michigan Supreme Court
Office of the Clerk
Michigan Hall of Justice
P.O.Box 30052
Lansing, Michigan 48909
Phone (517) 373-0120

January 6, 2004

Mr. Bill Butler
27810 Ryan Rd.
Warren, Mi 48092

Re: Butler v Chrysler Corp, Supreme Court # 125344

Mr.Butler:

Your application for Leave to Appeal in the above-referenced matter has been received and filed by this office and will be submitted to the court for its consideration on after January 5, 2004.

By copy of this letter, other counsel are advised that an answer to you application may be filed with this office. You and all other parties will be advised by mail when the Court has taken action.

CORBIN R. DAVIS

Supreme Court Clerk

CRD/cc

cc: John J. Ronayne III, Esq

Judith E. Caliman, Attorney

STATE OF MICHIGIAN

COURT OF APPEALS

BILL BUTLER,

Plaintiff-Appellant,

v

UNPLUBLISHED

December 4, 2003

No. 241413

Oakland Circuit Court

LC No. 00-022028-CL

CHRYSLER CORPORATION and COMPUWARE CORPORATION, d/b/a

Defendants-Appellees.

Before: Murray, P.J. and Gage and Kelly,JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition under MCR 2.1166(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214.(E).

Plaintiff brought this defamation action based on Defendants' failure to supply information about plaintiff's

employment history to prospective employers. Plaintiff asserted that when prospective employers checked his employment history, defendants denied that plaintiff ever worked for them. Plaintiff claimed that this denial constituted defamation that deprived him of employment.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. in evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff failed to provide evidence to support his claim. Plaintiff asserted that potential employers contacted defendants, and were told that there was no record of plaintiff's employment. Yet the official of the only potential employer identified by the plaintiff indicated that she did not make any contact with the defendants. Challenging the official's credibility does not create

admissible evidence in support of the plaintiff's claim. The trial court properly granted defendants' motion.

Affirmed.

/s/Chistopher M. Murray

/s/Hilda R. Gage

/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BILL BUTLER,

Plaintiff,

-v- No. 00 022038 CL

CHRYSLER CORPORATION and
COMPUWARE CORPORATION,
d/b/a PROFESSIONAL SERVICES,

Defendants.
_____/

RICHARD A. MEIER (P38204)
COUNSEL FOR PLAINTIFF
30300 NORTHWESTERN HWY
STE 320
FARMINGTON HILLS MI
48334
248 932-3500

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313 961-1900

OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse in the city of Pontiac, County of Oakland, and State Of Michigan on April 29, 2002

PRESENT: HONORABLE RICHARD D KUHN, CIRCUIT JUDGE

This matter is before the court on Defendant DaimlerChrysler's Motion to Enforce Order Granting its motion for Summary Disposition and Defendant Compuware Corporation's motion for Summary Disposition. The court heard oral argument and took the motions under advisement.

This an action for defamation. Plaintiff was a contract employee of MIS International, later purchased by Compuware, and was assigned to work for Chrysler, now DaimlerChrysler. Chrysler terminated Plaintiff, and he began to search for new employment. Plaintiff alleges that defendants falsely informed his potential employers that he never worked for them.

On December 13, 2000 this court granted DaimlerChrysler's Motion for summary Disposition as to Plaintiff's original complaint, pursuant to MCR 2.116 (C)(8). But granted plaintiff leave to amend the Complaint. Plaintiff did so.

DaimlerChrysler now moves for summary disposition as to Plaintiff's Second Amended Complaint, again pursuant to MCR 2.116(C)(8). 'A motion for summary disposition under MCR 2.116 (c)(8) tests the legal sufficiency of a claim to determine whether

the opposing part's pleadings allege a prima facie case." *Wortelboer v Benzie Co*, 212 Mich App 208, 217 (1995). All well-pleaded factual allegations are accepted as true. The motion should be granted only where the claim, based on the pleadings alone, is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. Paul v Bogle, 193 Mich App 479, 495-496 (1992).

This Court granted summary disposition previously because the complaint did not allege that Chrysler ever had a record of the plaintiff's employment by MIS at its facility. In the Second Amended Complaint, Plaintiff added allegations that Chrysler issued him a badge and corporate clearance, and that Plaintiff's Chrysler supervisor evaluated Plaintiff's performance at Chrysler on a Chrysler Corporation form. This would be evidence that Chrysler knew Plaintiff worked at its facility. Reckless disregard of the truth might be inferred from the fact that Chrysler subsequently told others he never worked there. Therefore, Chrysler is not entitled to summary disposition pursuant to MCR 2.116 (C)(8).

Defendant Compuware moves for summary disposition pursuant to MCR 2.116 (C)(10). DaimlerChrysler joined in the motion. A motion under MCR 2.116 (C)(10) tests the factual sufficiency of the complaint. Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999).

> In reviewing a motion for summary disposition brought under MCR 2.116 (C)(10), a trial court considers affidavits' pleadings, depositions, admissions, and documentary evidence filed in the action of submitted by the parties, MCR 2.116 (G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116 (C)(10) if the affidavits or other documentary evidence show there is no genuine issue in respect to any material fact, and moving party is entitled to judgment as a matter of law. MCR 2.116 (C)(10).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, deposition, admissions, other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420, 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Id. Where the burden of proof at trial on a dispositive issue rests on a

nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v Walter Thompson*, 437 Mich 109, 115, 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Smith v Globe Life Insurance Company, 460 Mich 446; 597NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358,362-363, 547 NW2d 31 (1996).

In his Second Amended Complaint, Plaintiff alleged that he applied at Combustion Components, Inc., and "learned from one Barbara _____ the interviewer, that both Chrysler Corporation and MIS International denied plaintiff ever worked for their company." In support of its motion, Compuware submitted the deposition transcript of Barbara Hurley. She interviewed Plaintiff in Connecticut for the position with Combustion Components, Inc. At her deposition, she testified that she nevere talked to anyone at MIS, Compuware or Chrysler about Plaintiff's

employment history. In response to the question, "Did you ever call up Mr. Butler and ask him and make a statement that, "Your Ford reference looks good, but what happened at Chrysler ?", she stated , "I don't recall that, no."

In response to the motion, plaintiff submitted the long distance telephone for the Connecticut company. Plaintiff claims the records show a call to Chrysler. DaimlerChrysler acknowledged that Plaintiff did show that a telephone call was placed to Chrysler. However, there is no proof that Ms. Hurley spoke to anyone, or what the content of any conversation may have been

Plaintiff may not rely on his allegation in the Second Amended Complaint, That he "learned from one Barbara_____ the interviewer, that both Chrysler and MIS International denied plaintiff ever worked for their company.", to raise a fact issue about the existence of the allegedly defamatory statement, because in summary disposition motion under subrule (C)(10), a non-moving party may not rely on mere allegations in pleadings.

Plaintiff also submitted a letter from a private investigator he hired, stating that the private investigator called MIS,

Compuware and Chrysler, and that all three stated they had no record of employment for a person with Plaintiff's name and social security. However even assuming that this letter is admissible, it does not support plaintiff's allegation that the defendant companies reported such information to his prospective employers. The same is true of a newspaper article submitted by the Plaintiff, where a staff writer states that calls by her newspaper yielded similar results to those of the investigator's.

For all of the above reasons, both Chrysler and Compuware are entitled to summary disposition pursuant to MCR 2.116 (C)(10).

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Chrysler's Motion for Summary Disposition pursuant to MCR 2.116 (C)(8)is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Compuware and Chrysler's motion for Summary Disposition pursuant to MCR 2.116 (C)(10) id granted.

IT IS FURTHER ORDERED AND ADJUDGED pursuant to MCR 2.602 (A)(3) that this Opinion and Order resolves the last pending claims and closes the case.

s/_____

RICHARD D. KUHN

CIRCUIT JUDGE

MICHIGAN CIVIL PROCEEDURE
MEDIATION AND OFFERS OF JUDGMENT

3. Remand to District Court

11.53 There is no longer any rule providing for the remand of cases from circuit to district court because the mediation award is less than the district court jurisdictional limit.

Before January 1997, MCL 600.641, MSA 27A.641 authorized the removal of actions from circuit court to district court if the amount of damages sustained might be less than the jurisdictional limit for the district courts. The statue was implemented by court rule, MCR 4.003. Effective January 1, 1997, both MCL 600.641 MSA 27A.641 and MCR 4.003 were repealed.

There is still a circuit court rule on the transfer of actions, MCR 2.227. However, a circuit court may not transfer an action to a district court under MCR 2.227 based on the amount in controversy unless the parties stipulate to the transfer or "[f]rom the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit for the district court." AO 1998-1. The amount of the mediation award thus has no bearing on the transfer of cases from circuit court to district court.

STATE OF MICHIGAN

IN THE 50TH JUDICIAL DISTRICT COURT

BILL BUTLER,

Plaintiff, Case no. CC-000077

-versus- Hon. Christopher C. Brown

CHRYSLER CORPORATION
and COMPUWARE CORPORATION,
d/b/a PROFESSIONAL SERVICES

Defendants.

Telephone deposition of BARBARA HURLEY, taken pursuant to the Federal Rules of Civil Procedure, at Combustion Components Associates, Inc., 884 Main Street, Monroe Connecticut, before Cheryl M. Alonza a Notary Public in and for the State of Connecticut, on April 24, 2001 at 11:40 AM.

APPEARANCES:

For the Plaintiff: (Via telephone)

RICHARD A. MEIER
30300 Northwestern Highway, Suite 320
Farmington Hills, Michigan 48334

For the Defendant Compuware Corporation: (Via telephone)

KASIBORSSSSKI, RONAYNE & FLASKA
1900 Buhl Building
535 Griswold
Detroit, Michigan 48226-36886
BY: L. JEAN BENOIT, ESQ

For the Defendant Chrysler Corporation: (Via telephone)

DaimlerChrysler Corporation
1000 Chrysler Drive
Auburn Hills, Michigan 48326-2766
BY: WILLIAM McCANDLESS, ESQ

ALSO PRESENT: JOHN F. HURLEY
EDWARD H. BIRD

STIPULATEDS

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that all technicalities as to proof of the official character before whom the deposition is to be taken are waved.

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties hereto that the reading and signing of the deposition by the deponent are waived.

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties hereto that all objections, except as to form, are reserved to the time of trial.

B A R B A R A H U R L E Y

50 Sunny Ridge Road, Easton Connecticut, called as a witness, having been first duly sworn by Cheryl M. Alonza, a Notary Public in and for the State ofConnecticut, was examined and testified as follows:

MS. BENOIT : For the record, my name is Jean Benoit. I represent the defendant Compuware in this matter. This is a deposition of Barbara Hurley, which is taken pursuant to Notice for all purposes provided under Michigan Court Rules.

DIRECT EXAMINATION

BY MS. BENOIT:

Q. Good Morning, Miss Hurley

A. Good Morning.

Q. I just have a few questions for you, which were pretty much reflected in the affidavit that you already provided to us.

Q. As a beginning, who is you employer

A. I work for Combustion Components associates in Monroe, Connecticut.

Q. What is the address for Combustion Components Associates?

A. 884 Main Street in Monroe, Connecticut.

Q. What is your position there

A. I am the manager of product assurance.

Q. How long have you been employed there?

A. About two-and-a-half years.

Q. During your tenure there, did there come a time when Combustion Components Associates needed to fill an engineering position?

A. Yes, there did.

Q. Who was responsible for that process?

A. There were several people involved. I coordinated it.

Q. Did Combustion Components receive a resume from William E. Butler?

A. Yes, we did.

MS. BENOIT: If the court reporter could present the exhibit to the witness, I'd appreciate it.

A. I have it.

MS. BENOIT: I ask this be admitted as an exhibit. without objection.

MR.MEIER: No Objection

MR. McCANDLESS: I have no objection

(Defendant's Exhibit 1 marked for Identification

Q. Miss Hurley, is this a copy of the resume you received for Mr. Butler?

A. Yes

Q. What company did Mr. Butler's resume identify as his immediate past employer?

A. MIS International Autoflex Incorporated from Bloomfield Hills, Michigan

Q. Was Mr. Butler interview by Combustion Components?

A. Yes

Q. What was the date of the interview?

A. June 3rd of 1999.

Q. During the course of that interview, did you learn the circumstances of Mr. Butler's termination from MIS International?

A. Not the circumstances, I did learn that he was let go on a Friday, with very little notice.

Q. Did Mr. Butler indicate that he'd also been replaced by a new employee on the following Monday?

A. Yes, he did.

Q. Based on the information that you received in the interview, did you conclude that Mr. Butler had left the employ of MIS on good terms?

A. I assume he didn't.

Q. Did you obtain the names of any references for Mr. Butler?

A. Yes. He gave me four.

Q. Okay. And did you contact any of the references?

A. I contacted one.

Q. And which reference was that?

A. A gentleman from Ford Marketing and Sales, a James, the last name is Doperak, D-o-p-i-r-a-k.

Q. Did you contact the Chrysler Corporation reference?

A. No, I did not.

Q. Did you attempt to contact any of the other references?

A. I don't remember. I may have I don't have any notes to the effect. I didn't talk to anyone else.

Q. Did Mr. Butler provide MIS international as a reference?

A. No, he didn't.

Q. Did you attempt to contact MIS International concerning Mr. Butler?

A. No, I didn't.

Q. Were you ever told by MIS International that Mr. Butler had not been their employee?

A. I never talked to anyone at MIS International.

Q. Were you ever told by Compuware Corporation that Mr. Butler had not been their employee?

A. I never talked to anyone at Compuware.

Q. Were you ever told by Chrysler Corporation that Mr. Butler had not been their employee?

A. I never talked to Chrysler.

Q. Could you repeat your answer?

A. I never talked to anyone at Chrysler.

Q. Thank you Who made the decision not to offer employment to Mr. Butler?

A. I think that there wasn't really a decision made. A former employee became available and wanted to return at the time, so that's what happened. We hired our former employee. There was no decision made against Mr. Butler.

Q. So that was the only reason that it was decided not to offer him employment?

A. Yes. We had someone that we knew that wanted to return to work here.

that's all that I have.

CROSS-EXAMINATION

BY MR. MEIER

Q. Miss Hurley, this is Richard Meier. I'm the attorney for Bill Butler and I have some questions I'd like to ask you, too.

A. Okay

Q. Originally, When Mr. Butler came to your company for the interview, Did he interview with anyone in your company, besides yourself?

A. Yes. He talked to several people.

Q. Who would they have been?

A. I'm not sure whom. He talked to the people that were involved in the process, depending upon who was in the office, were John Hurley, the technical director. Ed Bird, who is our financial person, and there were our several senior engineers. Some may or may not have seen him. I don't really know. John Dale would have been one. Scott Lindeman would have been another one. I don't really know who he talked to in the engineering.

Q. Are you the only person that would check on references for an individual employee?

A. In this particular instance, yes I was the one given that charter.

Q. I take it Mr. Hurley and Mr. Bird have some kind of professional contacts in their area. Do they call those people ever for references to assist you?

MR. McCANDLESS: I object to the form. I don't understand the question. I think you are asking her to go into the minds of Mr. Hurley and Mr. Bird.

Q. Let me ask you this: Had Mr. Hurley or Mr. Bird ever assisted you in the past in getting references?

MR. McCANDLESS: Objection to relevance. Insofar as it relates to Mr. Butler, she already testified clearly that no one but her called about a reference. Go ahead you can answer the question.

MS. BENOIT: You can answer over his objection.

Q. Had Mr. Hurley or Mr. Bird ever assited you in the past in getting references.

A. I don't think so.

Q. Did you go to lunch with Mr. Butler?

A. Yes I did.

Q. Where did you go to lunch?

A. A seafood restaurant close by.

Q. Did you have some kind of discussion concerning Mr. Butler's employment at lunch?

A. I don't really remember.

Q. Did you talk to him about any of his hobbies at lunch?

A. Yeah. He has several hobbies that we discussed.

Q. And did your talk to him about dating at lunch?

A. Dating?

Q. Yes

A. I don't think so.

Q. Did you talk to him about going to an art supply store in a nearby town?

A. Yes. His sister was looking for something and he was interested in getting it for her. I don't remember what it was, but I do remember talking about that, yes.

Q. Did you ever indicate to Mr. Butler at the end of the interview that that was one of nicest interviews you ever had with an employee.

A. I'm sure that I said something about enjoying lunch or enjoying talking to him. He's quite interesting person.

Q. My understanding is that two weeks later he caked you; is that correct?

A.I don't know.

Q. Did Mr. Butler call you two weeks later, after going to lunch with you.

A. I don't know. He called at some point wanting to know what the status of his proposed employment was. I don't know what you call it. He wanted to know what the status of things was.

Q. What did you indicated to him when he asked the question?

A. I told him that we were very interesting in him.

Q. Did you at that time ask for some references?

A. Possibly. I did at some point.

Q. So you indicated that you called the Ford reference Mr. Doperak?

A. Yes I talked to someone at Ford. Doperak, first name James.

Q. What kind of reference did Mr. Doperak give Mr. Butler?

A. A very good one.

Q. Do you know when you would have called Mr. Doperak, do your notes indicate that?

A. No, I sorry, they don't.

Q. You indicated that Mr. Butler gave you four references is that correct?

A. Yes.

Q. Why didn't you call the other three references after talking to Mr. Doperak?

A. I didn't see any point in spending any time on it. The Ford reference was excellent. We had liked Mr. Butler. Didn't seem to need to go on a witch hunt of any sort.

Q. Why do you call—You said that during your discussions or during reading the resume, you learned he had some problems at Chrysler; is that correct.

MR. McCANDLESS: I object to the form. That's not what she stated. She stated that his employment at MIS ended quickly.

Q. You learned those facts; is that correct?

MR. McCANDLESS: Objection. learn what facts?

Q. That his employment at MIS ended rather quickly?

A. All he told me is he left on a Friday, he was terminated on a Friday, and he was replaced on a Monday.

Q. But you didn't call to find out what the fact situation was concerning that; is that correct?

A. That's correct.

Q. Did you ever call up Mr. Butler and ask him and make a statement that, "Your Ford reference looks good , but what happen at Chrysler?"?

A. I don't recall that, no.

Q. When you say you "don't recall" it, it might have happened?

MR. McCANDLESS: Objection.

That's a mischaracterization of her previous testimony where she indicated categorically that she had not talked to Chrysler regarding Mr. Butler. You can answer the question.

The Witness: What was the question?

Q. Do you know whether or not you ever made calls to Mr. Butler and indicate to him that the Ford reference looked, what happened at Chrysler?

A. No. I wasn't under the impression that anything happened at Chrysler.

Q. So you are saying you definitely did not make that Call?

A. I'm saying---

MR. McCANDLESS: Objection Asked and answered.

A. I'm saying I don't recall that statement.

Q. And again, when you say you "don't recall" it , it may have happened?

MR. McCANDLESS: What may have happened? Mr. butler made a statement about that or that she called Chrysler?

Mr. Meier: That she made the statement.

Q. It may have happened, ma'am?

MR. McCANDLESS: Objection. Speculative.

Q. Go ahead and answer.

A. I don't know. I'm sorry. I don't know.

Q. So it could have happen?

MR. McCANDLESS: Objection

A. It could snow today, too.

Q. I want to know, could it have happen?

MR. McCANDLESS: You are asking for speculation. I object. I don't think that fair. The witness is under oath. If

you are asking her to speculate, she puts herself at risk. Go ahead, answer the question, ma'am, if you can.

A. I don't know. I'm sorry.

Mr. Meier I have nothing further.

MR. McCANDLESS: I have a couple of questions, ma'am.

RECROSS-EXAMINATION

BY MR. McCANDLESS:

Q. This is Bill McCandless. I represent DaimlerChrysler corporation.

With respect to his employment, where it references MIS International, if you had wanted to check on that reference, you should have called MIS, would you not, instead of Chrysler?

A. I don't know. I assume so.

Q. Okay that would be the normal process, that's the entity listed as his employer?

A. That would make sense, yeah.

MR. McCANDLESS: That's all I have. Thank you so much for your time.

The witness: You're welcome

Ms. BENOIT: Thank you.

(Deposition concluded: 11:50)

SANDERS, GALE & RUSSELL

203-624-4157

CERTIFICATE

.I here by certify that I am a notary public, in and for the State of Connecticut, duly commissioned and qualified to administer oaths.

I further certify that the deponent named in the forgoing deposition was by me duly sworn and thereupon testified as appears in the forgoing deposition ;that said deposition was taken by me stenographically in presence of counsel and reduced to print under my direction, and the forgoing id true an accurate transcript of the testimony.

I further certify that I am neither of counsel nor related to either of the parties to said suit, nor am I interested in the outcome of said cause.

Witness my hand and seal as Notary Public this 24th day of April 2001. s/_____

Cheryl M. Alonza, LSR, #00104

My Commission expires: 7-31-01

WITNESS INDEX

EXHIBIT INDEX

(Exhibit retained by the court reporter for inclusion in the original transcript)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF

OAKLAND

BILL BUTLER,

Plaintiff, Case No. 00-022028-CL

v Hon. Richard Kuhn

CHRYSLER CORPORATION, and

COMPUWARE CORPORATION

d/b/a PROFESSIONAL SERVICES

Defendants.
_____/

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248-512-4022
Attorneys for Defendant Chrysler Corporation

AFFIDAVIT OF BARBARA HURLEY

STATE OF CONNECTICUT SS:

COUNTY OF FAIRFIELD

Barbara Hurley, being duly sworn, deposes and says as follows:

1. I am employed by Combustion Components Associates, Inc., 884 Main Street, Monroe, Connecticut 06468 as the manager of Product Assurance.

2. When the need arose to fill a vacancy in an engineering position, I was the person given the responsibility of overseeing the process.

3. Combustion Components received a resume from William E. Butler. A copy is attached. Mr. Butler's resume identified MIS International as his immediate past employer.

4. Mr. Butler was interviewed by Combustion Components on June 3, 1999. During the interview process I learn from Mr. Butler that he was indicated that he had been laid-off on Friday and was replaced by a new employee the following Monday. Based on that information, I concluded that Mr. Butler had not left the employ of MIS International on good terms.

5. After some time after was interviewed at Combustion Components, I obtained from Mr. Butler the names of four references.

One was a Ford Motor reference with the whom I spoke; another was a Chrysler Corporation reference. I could not locate the Chrysler Corporation reference. I did not attempt to contact the other two references.

6. Because I had concluded that Mr. Butler did not leave the employ of MIS International on good terms, and because Mr. Butler had not provided a reference from MIS International. I made no attempt to contact MIS International concerning Mr. Butler.

7. I was never told by MIS International that Mr. Butler had not been their employee.

8. I was never told by Chrysler Corporation that Mr. Butler had not worked at Chrysler.

9. The decision to not offer employment to Mr. Butler was made by senior engineering personnel based upon:

a) his perceived technical ability,

b) his salary expectation,

c) the expenses that would be incurred in relocating him,

d) a former employee was seeking to return to work. The former employee had favorably impressed Combustion Components and was qualified for the position.

Further Affiant sayeth not.

s/_____

Barbara Hurley

Subscribed and sworn to before me
this 22nd day of November, 2000
s/_____
Ronald J. Consigli
Notary Public
Fairfield County, Connecticut
My Commission expires 4/30/03

P. O. BOX 1072, Arlington, Ma
781-643-2224

P. O. Box 35, N. Attleboro, Ma 02761
508-643-0250

TRACE
INVESTIGATION
SERVICES

December 17,1999

Mr. William Butler

RE: MIS International et al.

Mr. Butler:

Per your request we have checked your post employment status with the above referenced business as well as other businesses related to your employment and we are forwarding the following information:

As you are aware MIS International was purchased by Compuware (31440 Northwestern Hwy, Farmington, Mi 48334) Compuware Human Resources Dept. was contacted (248-737-7300) and stated that under your social security number they have no record of employment. Further inquires indicate a William T. Butler who was terminated in 1988, this individual having a different social security number.

Inquires indicated that MIS International still maintained a listing at 445 Enterprise Ct, Bloomfield Hills, MI with a phone

number 248-253-9500. Calls to this number reached a person who answered the phone by stating "Professional Services" This individual stated that it had been MIS International and was now Compuware. The Human Resources department at this location also checked their records under your name and social security number and reported no record of your employment.

The Chrysler corp., to which you were assigned to their contract division, was contacted at its main offices at 800 Chrysler Dr. Aurburn Hills, MI (248-576-6558). They also have no record of your employment. Attempts to reach the Neon division were unsuccessful as the main office states that the division and it's manager could be any where within the corporation (we found 8 locations for Chrysler in Michigan alone).

Should you have any questions regarding this information please contact our offices at (508) 643-0250.

Respectfully submitted,

/_____

Tim Lampon

Trace Investigation Services,Inc

THE OBSERVER & ECCENTRIC/ SEPTEMBER 17, 2000

Lawsuit: Man wants career back

By Julie Brown
Staff Writer

Bill Butler's got a gap in his resume about 2 years. The 46-year-old former Westland resident says filling that gap is the key to continuing his career. Butler was fired by MIS international, a contract agency bought later by Compuware on Oct. 31, 1998. He was working on contract at then-Chrysler Corp. as a mechanical design engineer.

Butler said he was to get a review at the end of his contract, "It didn't happen," he said. "There were some issues with the different supervisors I worked for."

He cited one supervisor who liked hunting, which Butler does not. Butler, who earned a bachelor's degree in mechanical engineering from the University of Hartford in 1985, was dismissed.

"When they dismissed me, I didn't even ask what the reason was." He went to Massachusetts, his home state, to find work in New England.

Butler, now staying with a friend in Oak Park, Interview with Pratt & Whitney Aircraft, where he had worked nine years previously. He didn't get a job.

He interview with Combustion Components Associates Inc., giving former employers Ford Motor Co. and Chrysler as references. When questions arose about the Chrysler reference, Butler decided to do some probing.

He hired a investigator, Tim Lampron of Trace Investigation services, who reported Dec. 17, 1999 that there was no record of his employment With MIS International.

Observer calls yielded similar results, with Joni Dewan of Compuware human resources saying there was no record of such an employee. Barbara Maher of public relations at DaimlerChrysler said it would be necessary to have a supervisor's name to verify employment, and suggested contacting the contract employer,

John Ronayne, III, attorney for DaimlerChrysler, was contacted by the Observer for a statement Aug 29 and Sept. 11. He promised to contact Compuware's lawyer and release a statement, but never provided one.

Compuware attorney Judith Caliman did not respond to a Sept.14 fax request for comments.

"I don't like to change jobs," Butler said citing his stints with Pratt Witney Aircraft, Williams International in Walled Lake and two auto makers. He was with Williams International for four years, and had done factory work before and during college.

William, who is single said he has been staying with family and friends since losing his job. He's camped out as well, butt considers himself basically homeless and is anxious to find work.

He relied on unemployment compensation early on and now is using his 401(k) money to live. Bill collectors are coming after him. "they're saying we have no record of him," Butler said of his former employer.

Butler has an attorney, Richard Meier who practices in Farmington Hills. "I don't think I've ever run across anything like this" Meier said. "It's a highly unusual case."

Meier said he was unsure if the employments had been lost. A defamation case has been filed in Oakland County Circuit Court, before Judge Richard Kuhn, with a motion filed to dismiss the case.

Kuhn has taken it under advisement, Meier said." It may go on for a while" Damages sought are unspecified, said Meier, who said the evidence supports Butler's complaint.

"This is my livelihood," Butler said. "People won't give me a job because of this situation."

He was unsuccessful at a grocery store and deli, too. In the last year and a half, Butler's been looking for work on the Web as well. Before Compuware hired a outside attorney, that business had agreed to call companies he'd interviewed with and pay any lost wages Butler said.

He's suing both Compuware and DaimlerChrysler. "I want my life back together again.'

He wants his credit fixed an admission of wrongdoing and money.

Note: the Defendant attorney's names got switch at the time of print of this article....John Ronayne III is the attorney for Compuware and Judith Caliman is the attorney for DiamelerChrysler.

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05-430

No. ~~04-2155~~

IN THE

Supreme Court of the United States

BILL BUTLER,

Petitioner,

v.

DAIMLERCHRYSLER CORPORATION AND COMPUWARE CORPORATION d/b/a PROFESSIONAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DAIMLERCHRYSLER CORPORATION

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QUESTIONS PRESENTED

Did the Sixth Circuit Court of Appeals properly affirm that Plaintiff-Petitioner's claims, which were previously litigated in the Michigan state courts, were barred by the doctrine of res judicata?

CORPORATE DISCLOSURE STATEMENT - PURSUANT TO SUPREME COURT RULE 29.6

Respondent DaimlerChrysler Corporation, a Delaware Company, is a wholly owned subsidiary of DaimlerChrysler Motors Company LLC, a Delaware company, which is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, a Delaware company, which is a wholly owned subsidiary of DaimlerChrysler AG, a German Corporation whose stock is publicly traded.

DaimlerChrysler AG owns all of the stock of DaimlerChrysler North America Holding Corporation, which is the sole member of DaimlerChrysler Motors Company LLC, which owns all of the stock of DaimlerChrysler Corporation.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

TABLE OF APPENDICES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported, and is set out at pages 1a-3a of the Appendix to the Brief in Opposition to the Writ of Certiorari. The Order Accepting the Magistrate Judge's Report and Recommendation and the Report and Recommendation of the Magistrate Judge of the District Court are unreported, and are set out at pages 4a-16a of the Appendix to the Brief in Opposition to the Writ of Certiorari.

The Order of the Supreme Court of Michigan is reported at 469 Mich. 1018; 677 N.W.2d 22 (2004). The opinion of the Court of Appeals of Michigan is unpublished, but can be found at 2003 Mich. App. Lexis 3125 (2003), and is set out at pages 17a-18a of the Appendix to the Brief in Opposition to the Writ of Certiorari. The trial court's order is unreported and is set out at pages 19a-24a of the Appendix to the Brief in Opposition to the Writ of Certiorari.[1]

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on July 23, 2005. The Petition was filed on August 23, 2005, and docketed on October 4, 2005.

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1. Upon review of Plaintiff Petitioner's Appendix, Respondent DaimlerChrysler noticed several typographical errors in the re-typed orders of the lower courts. Therefore, Respondent DaimlerChrysler has attached an appendix containing the actual orders of the lower courts.

RULES INVOLVED

Rule 12(b) of the Federal Rules of Civil Procedure provides:

> **(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56 (b), (c), (e) of the Federal Rules of Civil Procedure provides:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court

may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Plaintiff Petitioner Bill Butler ("Plaintiff" or "Petitioner") filed the instant Complaint on or about March 30, 2004 and served it upon Defendant Respondent, DaimlerChrysler Corporation ("Defendant" or "Respondent"), on April 1, 2004. The Complaint alleges the same claims against the same parties that were previously litigated in the Oakland County Circuit Court, Case No. 00-022028-CL, and appealed to the Michigan Court of Appeals, Case No. 241413 and Michigan Supreme Court, Case No. 125344, 469 Mich. 1018 (2004) (denying application for leave to appeal). In the state court case, Plaintiff alleged a claim of defamation against Defendants DaimlerChrysler and Compuware arising out of alleged false statements made by Defendants to Plaintiff's potential employers.

In his federal court complaint at issue here, Plaintiff did not raise any new allegations that were not raised in his state court claim. Instead, the federal complaint was based on the same facts and allegations as the first action, namely, that the

Defendants defamed Plaintiff during his employment search. Defendants DaimlerChrysler and Compuware filed a Joint Motion to Dismiss Plaintiff's Complaint in federal court in its entirety based upon the Doctrine of Res Judicata. The Honorable Judge Feikens referred the Motion to Magistrate Judge Virginia Morgan for a Report and Recommendation pursuant to 28 U.S.C. § 636(B)(1)(B). Magistrate Judge Morgan heard oral argument from all parties on June 28, 2004. On July 30, 2004, Magistrate Judge Morgan issued her Report and Recommendation, whereby she recommended that Defendants' Motion be granted and the case be dismissed. Plaintiff filed objections to the Report and Recommendation, and Defendant DaimlerChrysler filed a Response to the Objections on August 11, 2004.

The Honorable Judge Feikens issued an Order accepting Magistrate Morgan's Report and Recommendation, after reviewing both the objections filed by Plaintiff and the Response to same filed by Defendant DaimlerChrysler. The Order dismissed Plaintiff's claims in their entirety on August 24, 2004.

Plaintiff then appealed the Order to the Sixth Circuit Court of Appeals. After determining that oral argument was not necessary, the Sixth Circuit affirmed the lower courts, holding that Plaintiff's claims were barred by res judicata because Plaintiff filed a prior action which was decided on its merits, and was raising the same issue against the same defendants. Plaintiff has now filed a Petition for Writ of Certiorari, challenging decisions from the 50th District Court, Oakland County Circuit Court, Michigan Court of Appeals, Michigan Supreme Court, Federal Judicial Council, United States District Court, Eastern District of Michigan, and the Sixth Circuit Court of Appeals.

REASONS FOR DENYING THE PETITION

Plaintiff Petitioner has failed to present any compelling reasons to grant his petition as required under Supreme Court Rule 10. The decisions below do not conflict with any decisions of this Court, or any Court of Appeals, nor do they decide an important federal question that has not been resolved by this Court. Instead, the Sixth Circuit affirmed the longstanding principle under Michigan law that once an issue has been resolved on the merits, it cannot be re-litigated against the same parties. *See, e.g., Reithmiller v. Blue Cross & Blue Shield of Mich.*, 824 F.2d 510, 511 (6th Cir. 1987); *see also, Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482, n.22, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982) ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes . . ."). Accordingly, Respondent DaimlerChrysler Corporation respectfully requests that Plaintiff's Petition for Writ of Certiorari be denied.

A. Most of the Questions Presented for Review Are Not Properly Before the Court

Construed liberally, Plaintiff-Petitioner seeks review of issues decided by the 50th District Court, Oakland County Circuit Court, Michigan Court of Appeals, Michigan Supreme Court, Federal Judicial Council[2] and the United States District Court for the Eastern District of Michigan. These decisions by the lower courts may not be directly appealed to the United States Supreme Court on a petition for writ of certiorari. *See* Supreme Court Rule 10, 13.

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2. Respondent DaimlerChrysler was not a party to the challenges before the Judicial Council.

More importantly, Plaintiff-Petitioner's request for review of the Michigan Supreme Court's decision (as well as any decision of the lower courts in Michigan) is untimely. Under Supreme Court Rule 13, a petition for writ of certiorari is only timely when it is filed with the Supreme Court within 90 days after entry of the judgment or order denying discretionary review. The Michigan Supreme Court entered its Order denying leave to appeal on February 27, 2004. Plaintiff's Petition for Writ of Certiorari was not filed until almost 6 months later on August 23, 2005.[3] Accordingly, the Petition was not filed within 90 days after entry of the Michigan Supreme Court's order, and it is untimely.

B. No Compelling Reasons Exist for Granting the Petition for Writ of Certiorari

While Plaintiff is not happy with the result he received in the state courts, a mere unfavorable result is not subject to appeal in the federal courts, and there is clearly no compelling reason to grant Plaintiff's Petition for Writ of Certiorari. It is well-settled law that under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, __ U.S. __, 125 S. Ct. 2491, 2500, n.16, 162 L. Ed. 2d 315 (2005) (citing *Allen* v. *McCurry*, 449 U.S. 90, 94-96, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)). Res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*

3. Plaintiff filed a petition for writ of certiorari on August 23, 2005. That petition was returned to petitioner to correct deficiencies. Plaintiff's corrected petition was docketed on October 4, 2005.

The Doctrine of Res Judicata bars a subsequent action between the same parties or their privies based upon the same claims or causes of action that were or could have been raised in a prior action and thereby is intended to avoid the relitigation of claims which have been previously decided by another tribunal. Federal courts are required to give the same preclusive effect to a previous state court judgment as such a judgment would receive in the courts of the rendering state. *See Migra* v. *Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 85, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *Dyer* v. *Intera Corp.*, 897 F.2d 1063, 1066 (6th Cir. 1989).

Michigan state courts have adopted a broad application of the Doctrine of Res Judicata, applying it to claims actually litigated, as well as claims which could have been brought in the first action. *See VanDeventer* v. *Michigan Nat'l Bank*, 172 Mich. App. 456, 464, 432 N.W.2d 338 (Mich. Ct. App. 1988). Even in instances where one suit is brought under state law and the other is brought under federal law, the Sixth Circuit has held that the two causes of action were "sufficiently identical to support application of Res Judicata to bar the second" suit. *Harris* v. *Ashley*, 165 F.3d 27 (6th Cir. 1998) (per curiam) (unpublished order).

A subsequent complaint is barred by Res Judicata if (1) the prior action was decided on its merits; (2) the issues raised in the second case either were resolved in the first, or through the exercise of reasonable diligence might have been resolved in the first case; and (3) both actions involved the same parties. *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); *Bittinger* v *Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir. 1997); *Sloan* v. *Madison Heights*, 425 Mich. 288, 389 N.W. 2d 418 (Mich. 1986).

In this case, Plaintiff's prior state court action was dismissed on its merits pursuant to MCR 2.116(C)(10). In Michigan, a dismissal based upon MCR 2.116(C)(10) is an adjudication on the merits. *See Sherrell* v. *Buhgaski*, 169 Mich. App. 10, 17, 425 N.W. 2d 707 (Mich. Ct. App. 1988) ("[a] dismissal on motion by the defendants, after judicial consideration, as opposed to a ministerial procedural dismissal, is an adjudication on the merits"); *Wilson* v. *Knight-Ridder Newspapers, Inc.*, 190 Mich. App. 277, 279, 475 N.W.2d 388 (Mich. Ct. App. 1991) ("dismissal with prejudice . . . amounted to an adjudication of the merits and bars this action").

Moreover, the issues raised in Plaintiff's federal court "civil rights" complaint were resolved in his state court action. Plaintiff's federal court action is based upon the same alleged defamation during his employment search as Plaintiff's state court action which was previously litigated. Indeed, no new action by Defendants is alleged in Plaintiff's federal "civil rights" complaint. Additionally, the parties in Plaintiff's state court defamation action and his federal court "civil rights" action are identical. Simply stated, the Plaintiff has alleged the same claims arising out of the same facts against the same parties. Accordingly, res judicata applies, and Plaintiff's federal "civil rights" action was properly dismissed under Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Civil Procedure 56.[4]

Given this well-settled law, and the fact that Plaintiff has failed to show a compelling reason to grant his petition, there is simply no reason to revisit Plaintiff's claims that he

4. While Defendants filed their motion to dismiss under Fed. R. Civ. P. 12(b)(6), the district court treated it as a motion for summary judgment under Fed. R. Civ. P. 56.

has litigated through Michigan State courts or the judicial commission.[5]

CONCLUSION

For the foregoing reasons, Respondent, DaimlerChrysler Corporation, respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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5. Additionally, although not challenged by Plaintiff-Petitioner, the Sixth Circuit also properly noted that this "civil rights action" was not cognizable because the Defendants are not state actors for a 42 U.S.C. § 1983 claim, and Plaintiff failed to allege adequate facts or exhaust administrative remedies for a proper employment discrimination claim under federal law.

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 26, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-2155

BILL BUTLER,

Plaintiff Appellant,

v.

CHRYSLER CORPORATION; COMPUWARE CORPORATION, doing business as Professional Services,

Defendants-Appellees.

ORDER

Before: BATCHELDER, GIBBONS, and MCKEAGUE, Circuit Judges.

Bill Butler, a Michigan resident, appeals pro se a district court order dismissing a complaint he filed on the ground that it was barred by res judicata. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Butler filed this complaint, alleging that it was a "civil rights" action. According to the complaint, Butler was

employed by defendants as a mechanical engineer until his firing in 1998. Subsequently, when seeking new employment, he alleged that defendants told prospective employers that he had never worked there, thus preventing him from obtaining a new job.

Defendants moved for dismissal of the complaint, arguing that it was barred by res judicata because Butler had unsuccessfully pursued a defamation action in the Michigan state courts based on the same allegations. They submitted the decisions of the Michigan courts, which showed that they had been granted judgment because Butler provided no evidence that any prospective employer had failed to hire him based on defendants' refusal to acknowledge his employment. Butler pursued this case through the state court system to the Michigan Supreme Court.

This complaint was referred to a magistrate judge, who heard oral argument on the motion to dismiss and Butler's response. The magistrate judge's report and recommendation; after first stating that the motion to dismiss would be converted to a motion for summary judgment, recommended that the motion to dismiss be granted. The district court adopted this recommendation over Butler's objections. This appeal followed.

Initially, it is noted that, although Butler characterized this as a civil rights action, the named defendants could not be sued under 42 U.S.C. § 1983, as neither is a state actor. *Polk County v. Dodson,* 454 U.S. 312, 318-19 (1981). The complaint also contained no allegations of employment discrimination on the basis of Butler's membership in a

protected group, nor any indication that he had filed a charge with the B.E.O.C. and received a notice of the right to sue, in order to file a complaint of employment discrimination. *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989).

Moreover, even construing the complaint liberally as a diversity defamation claim, it was properly found barred by res judicata. Whether defendants' motion was construed as one for dismissal or summary judgment, decisions relying on res judicata are reviewed de novo. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). This complaint was barred by res judicata because Butler had filed a prior action which was decided on its merits, raising the same issue against the same defendants. *Reithmiller v. Blue Cross & Blue Shield of Mich.*, 824 F.2d 510, 511 (6th Cir. 1987). Although Butler does not believe that his claim was fairly addressed by the state courts, an appeal from an unfavorable result in state court is not available in federal district court. *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 510 (6th Cir. 2000).

The district court's order is therefore affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/ [illegible]
Clerk

APPENDIX B — ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED AUGUST 27, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 04-71173
Hon. John Feikens

BILL BUTLER,

Plaintiff,

v.

DAIMLERCHRYSLER. CORP., and COMPUWARE CORP. d/b/a Professional Services,

Defendant.

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court having reviewed the Magistrate Judge's Report and Recommendation, filed on **7/30/2004**, the Objections by Plaintiff filed on **8/11/2004**, and Defendant DaimlerChrysler's Response to the Objections filed on **8/11/2004**.

Appendix B

IT IS **ORDERED** that the Report and Recommendation is accepted and Defendants' Joint Motion to Dismiss is **GRANTED** and the case is **DISMISSED**.

s/ John Feikens
John Feikens
United States District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JULY 30, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 04 CV 71173 DT
DISTRICT JUDGE JOHN FEIKENS
MAGISTRATE JUDGE VIRGINIA M. MORGAN

BILL BUTLER,

Plaintiff,

v.

DAIMLERCHRYSLER CORP., and COMPUWARE CORP. d/b/a PROFESSIONAL SERVICES,

Defendants.

REPORT AND RECOMMENDATION

I. INTRODUCTION

Defendants DaimlerChrysler Corporation ("DaimlerChrysler") and Compuware Corporation d/b/a Professional Services ("Compuware") have filed this Joint Motion to Dismiss pursuant to Fed.R.Civ.P. 12 (b)(6). The

motion has been referred to this court. Oral argument was heard on June 28, 2004. Defendants argue that Plaintiff Bill Butler's claim is precluded by the doctrine of *res judicata,* based on prior judgments in state courts from the circuit, appellate, and supreme courts of Michigan. Plaintiff filed a response to Defendants' motion. Defendants filed "objections" to Plaintiffs response. For the reasons stated in this Report, it is recommended that the Motion be granted and the case dismissed.

II. BACKGROUND

Plaintiff has brought this suit alleging civil rights violations under 42 U.S.C. § 1983, specifically with regard to his employment history. Plaintiff had been in the employ of MIS International ("MIS"), a contract services agency. MIS was later purchased by Compuware and renamed "Professional Services." Plaintiff was placed at then-Chrysler Corporation[1] as a mechanical design engineer. MIS terminated Plaintiff in October 1998. Plaintiff subsequently began to search for new employment. Plaintiff claims, that while in that process, Defendants knowingly defamed Plaintiff and hindered his employment search by refusing to acknowledge his employment at either entity.

Plaintiff brought a defamation suit against both DaimlerChrysler and Compuware in Oakland County Circuit Court. On December 13, 2000, summary disposition was granted to Defendants with regard to Plaintiff's original

1. Daimler-Benz AG and Chrysler Corporation merged in 1998 to form DaimlerChrysler Corporation.

complaint, with leave to amend. Plaintiff did so amend and summary disposition was granted as to the amended complaint on April 29, 2002.

Plaintiff appealed as of right to the Michigan Court of Appeals. On December 4, 2003, the Court of Appeals affirmed the trial court stating, "A motion under MCR 2.116 (C)(10) (for summary disposition) tests the factual sufficiency of the complaint. . . . Plaintiff failed to provide evidence to support his claim." (Citation omitted). Plaintiff then petitioned the Michigan Supreme Court for immediate consideration and the application for leave to appeal the judgment of the Court of Appeals. On February 27, 2004, immediate consideration was granted and the application for leave to appeal was denied.

Failing to have succeeded on any of his claims in the Michigan courts, Plaintiff brought suit on March 30, 2004 in this federal court. Plaintiff alleges, without statutory reference, violation of his civil rights with respect to his employment history, claiming the aforementioned failure to properly report his employment history. On April 16, 2004, Defendants moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) alleging that Plaintiff's federal suit is precluded by the doctrine of *res judicata*.

III. ANALYSIS

Defendants seek dismissal of the instant action based on Fed.R.Civ.P. 12 (b)(6), alleging Plaintiff has failed "to state a claim upon which relief can be granted," due to the

doctrine of *res judicata*. "If *res judicata* is raised as an affirmative defense . . . Rule 12(b) and Rule 12(c) both provide that the motion will be treated as one for summary judgment." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d*, § 2735.3 (1998). Fed.R.Civ.P. 12(b) states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 56(b) states the right of the "party against whom a claim . . . is asserted" to move for summary judgment. Federal Rule of Civil Procedure 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Appendix C

The standard for showing such a required absence of any issue of material fact is set forth in Federal Rule of Civil Procedure 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The standard of showing such an absence of a "genuine issue of material fact" set forth above in Fed.R.Civ.P 56(e) has been summarized by the Sixth Circuit. *Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc.*, 32 F.3d 989, 993 (6th Cir. 1994). The Court noted "On summary judgment motions, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the parties opposing the motion." *Haverstick Enterprises, Inc.*, at 993 citing *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), The Court also noted, "However, '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* The Court further clarifies the standard, stating "Summary Judgment must be entered against a party who failed to provide sufficient evidence in support of an essential element of that party's case."

Haverstick Enterprises. Inc. at 993 citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d. 265 (1986).

In determining whether a summary judgment motion can be granted to a party alleging *res judicata,* the Supreme Court has charted this route: "Under the doctrine of *res judicata, a* judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327, 99 S.Ct. 645, 649 (1979), citing J. Moore, *Federal Practice* ¶0.405[1], pp. 622-624 (2d ed. 1974). When, as in this action, the prior suit was adjudicated by the state courts and the related, succeeding case is a federal action, case law interpreting the Full Faith and Credit Clause of the Constitution must be followed. The codified language of the statute "reads in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

28 U.S.C. § 1738 quoted by *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75, 80, 104 S.Ct. 892, 896 (1984). "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the

judgment was rendered." *Migra* at 81 citing *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980).

The Supreme Court has specifically addressed, however, the question of whether the law of *Allen* cited above by *Migra* is relevant to 42 U.S.C. § 1983 actions. *Migra* dealt with the question of whether the *Allen* rule was applicable to claims, specifically civil rights questions, where the Federal government is entrusted with the power to determine whether such state civil rights law is unconstitutional. "In *Allen*, the Court considered whether 42 U.S.C. § 1983 modified the operation of § 1738 so that a state-court judgment was to receive less than normal preclusive effect in a suit brought in federal court under § 1983." *Migra* at 81. The Court explained, "[n]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738 . . ." *Migra* at 82 citing *Allen*, 449 U.S. at 97, 101 S.Ct., at 416. "*Allen* therefore made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra* at 83. While *Allen* ruled that issue preclusive effect can be given to state court judgments in § 1983 cases, *Migra* extended the rule to include the effect of claim preclusion as well. "[W]e must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case." *Id.* at 84.

Appendix C

Migra also notes that a federal claim that could have been brought by a claimant in the prior state court suit is afforded the same preclusive effect as if it had been included. "Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Id.* at 85.

Plaintiff did not specifically raise 42 U.S.C. § 1983 as the statute under which his claim is brought. However, Plaintiff explicitly states "his civil rights have been violated" as well as noting on the "Civil Cover" sheet "Federal Question" jurisdiction, with "Employment" selected under the "Civil Rights" category.

Since § 1983 claims have the same preclusive effect afforded other claims under 28 U.S.C. § 1738 under the rulings of *Allen* and *Migra*, Michigan's *res judicata* case law must be applied to the instant action. In Michigan, "[t]here are three prerequisites to the application of the *res judicata* doctrine: (1) there must have been a prior decision on the merits; (2) the issues must have been resolved in the first action, either because they were actually litigated or because they might have been presented in the first action; and (3) both actions must be between the same parties or their privies." *VanDeventer v. Michigan National Bank*, 432 N.W.2d 338, 342 (Mich. App. 1988) citing *Sloan v. Madison Heights*, 425 Mich. 288, 295, 389 N.W.2d 418 (1986). Defendant also notes in its brief the additional rule in *VanDeventer* that "Michigan courts apply the *res judicata* doctrine broadly so as to bar claims that were actually litigated as well as claims arising out of the same transaction

which a plaintiff could have brought, but did not." *VanDeventer* at 342 citing *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147, 160, 294 N.W.2d 165 (1980).

Applying the *Sloan* standard, there has been a "prior decision on the merits" in this matter. Plaintiff's first complaint was decided in Defendants' favor on a motion for summary disposition. The order was granted pursuant to MCR 2.116 (C)(10). MCR 2.116 (C)(10) states:

> (C) The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> > (10) Except as to the amount of damages, there is not genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

In Michigan, "summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of *res judicata*." *Capital Mortg. Corp. v. Coopers & Lybrand*, 369 N.W.2d 922, 924 (Mich. App. 1985) citing *City of Detroit v. Nortown Theater, Inc.*, 323 N.W.2d 411, (Mich. App. 1982). As noted, the Michigan Court of Appeals affirmed the decision of the Oakland County Circuit Court on December 4, 2003. The Michigan Supreme Court denied leave to appeal on February 27, 2004.

The second prerequisite needed to apply the doctrine of *res judicata* has been satisfied as well. Plaintiff has brought

no allegations which were not litigated in the first action. The claim is based on the same facts and allegations, specifically the Defendant companies defamed Plaintiff during his employment search. While Plaintiff brings this claim under the auspices of a § 1983 claim separate from his state court defamation claim, it is well established that such an action is held to the same standard for claim preclusive purposes. *Migra, supra.* Plaintiff has alleged that one of the bases for his federal claim is that the Michigan state courts "in his case were incompetent." Plaintiff's usage of "incompetent," however, is incorrect and not a valid challenge to the court's competency. The "competency" of the proceedings refers not to the conduct of the court nor the outcome of the case nor Plaintiff's allegations of misconduct, but rather the appropriateness of the court's jurisdiction. Plaintiff also alleges "incompetency" of the court in relation to what could be perceived as Plaintiff's own errors, claiming certain depositions were not taken prior to the first action. This argument is also without merit.

Third, both the state court actions and instant federal claim are between the same parties, having the same Plaintiff and Defendants. Based on the doctrine of *res judicata,* all prerequisites for a bar to Plaintiff's federal claim have now been satisfied. Defendants' Motion pursuant to Fed.R.Civ.P. 12 (b)(6) should be granted.

IV. CONCLUSION

Accordingly, it is recommended that Defendants' Joint Motion to Dismiss be granted and the case be dismissed.

Appendix C

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless, by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

s/ Virginia M. Morgan
VIRGINIA M. MORGAN
UNITED STATES MAGISTRATE JUDGE

Dated: July 30, 2004

APPENDIX D — MEMORANDUM OPINION OF THE STATE OF MICHIGAN COURT OF APPEALS DATED DECEMBER 4, 2003

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 4, 2003

No. 241413
Oakland Circuit Court
LC No. 00-022028-CL

BILL BUTLER,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION and COMPUWARE CORPORATION, d/b/a PROFESSIONAL SERVICES,

Defendants-Appellees.

Before: Murray, P.J. and Gage and Kelly, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Appendix D

Plaintiff brought this defamation action based on defendants' failure to supply information about plaintiff's employment history to prospective employers. Plaintiff asserted that when prospective employers checked his employment history, defendants denied that plaintiff ever worked for them. Plaintiff claimed that this denial constituted defamation that deprived him of employment.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff failed to provide evidence to support his claim. Plaintiff asserted that potential employers contacted defendants, and were told that there was no record of plaintiff's employment. Yet, the official of the only potential employer identified by plaintiff indicated that she did not make any contact with defendants. Challenging the official's credibility does not create admissible evidence in support of plaintiff's claim. The trial court properly granted defendants' motion.

Affirmed.

s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly

APPENDIX E — OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION OF THE STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED APRIL 29, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 00 022028 CL

BILL BUTLER,

Plaintiff,

-v-

CHRYSLER CORPORATION and COMPUWARE CORPORATION, d/b/a PROFESSIONAL SERVICES,

Defendants.

OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan on April 29, 2002.

Appendix E

PRESENT: HONORABLE RICHARD D. EDEN, CIRCUIT JUDGE

This matter is before the Court on Defendant DaimlerChrysler's Motion to Enforce Order Granting its Motion for Summary Disposition and Defendant Compuware Corporation's Motion for Summary Disposition. The Court hoard oral argument and took the motions under advisement.

This is an action for defamation. Plaintiff was a contract employee of MIS International, later purchased by Compuware, and was assigned to work for Chrysler, now DaimlerChrysler. Chrysler terminated Plaintiff, and he began to search for new employment. Plaintiff alleges that Defendants falsely informed his potential employers that he never worked for them.

On December 13, 2000, this Court granted DaimlerChrysler's Motion for Summary Disposition as to Plaintiff's original Complaint, pursuant to MCR 2.116(C)(8), but granted Plaintiff leave to amend the Complaint. Plaintiff did so.

DaimlerChrysler now moves for summary disposition as to Plaintiff's Second Amended Complaint, again pursuant to NCR 2.116(C)(8). "A motion for summary disposition under NCR 2.116(C)(8) tests the legal sufficiency of a claim to determine whether the opposing party's pleadings allege a prima facie case." *Wortelboer v Benzie Co,* 212 Mich App 208, 217 (1955). All well-pleaded factual allegations are accepted as true. The motion should be granted only where the claim, based on the pleadings alone, is so clearly

unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Paul v Bogle*, 193 Mich App 479, 495-496 (1992).

This Court granted summary disposition previously because the Complaint did not allege that Chrysler ever had a record of the plaintiff's employment by MIS at its facility. In the Second Amended Complaint, Plaintiff added allegations that Chrysler issued him a badge and corporate clearance, and that Plaintiff' s Chrysler supervisor evaluated Plaintiff's performance at Chrysler on a Chrysler Corporation form. This would be evidence that Chrysler knew Plaintiff worked at its facility. Reckless disregard of the truth might be inferred from the fact that Chrysler subsequently told others he never worked there. Therefore, Chrysler is not entitled to summary disposition pursuant to MCR 2.116(C)(8).

Defendant Compuware moves for summary disposition pursuant to MCR 2.116(C)(10). DaimlerChrysler joined in the motion. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999).

> In reviewing a motion for summary disposition brought under MCR 2.116 (C) (10) , a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR

2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, deposition, admissions, or other documentary evidence. *Naubacher v Gobe Furniture Rentals,* 205 Mich App 418, 420, 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson,* 437 Mich 109, 115, 459 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the notion is properly granted. *McCormick v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Smith v Globe Life Insurance Company, 460 Mich 446; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363, 547 NW2d 314 (1996).

Appendix E

In his Second Amended Complaint, Plaintiff alleged that he applied at Combustion Components, Inc., and "learned from one Barbara _____ the interviewer, that both Chrysler Corporation and MIS International denied plaintiff ever worked for their company." In support of its motion, Compuware submitted the deposition transcript of Barbara Hurley. She interviewed Plaintiff in Connecticut for the position with Combustion Components, Inc. At her deposition, she testified that she never talked to anyone at MIS, Compuware or Chrysler about Plaintiff's employment history. In response to the question, "Did you ever call up Mr. Butler and ask him and make a statement that, "Your Ford reference looks good, but what happened at Chrysler?", *she stated,* "I don't recall that, no."

In response to the motion, Plaintiff submitted the long distance telephone records for the Connecticut company. Plaintiff claims the records show a call to Chrysler. DaimlerChrysler acknowledged that Plaintiff did show that a telephone call was placed to Chrysler. However, there is no proof that Ms. Hurley spoke to anyone, or what the content of any conversation tray have been.

Plaintiff may not rely on his allegation in the Second Amended Complaint, that he "learned from one Barbara _____ the interviewer, that both Chrysler Corporation and MIS International denied plaintiff ever worked for their company", to raise a fact issue about the existence of the allegedly defamatory statement, because in a summary disposition motion under subrule (C) (10), a non-moving party may not rely on mere allegations in pleadings.

Appendix E

Plaintiff also submitted a letter from a private investigator he hired, stating that the private investigator called MIS, Compuware and Chrysler, and that all three stated they had no record of employment for a person with Plaintiff's name and social security. However, even assuming that this letter is admissible, it does not support Plaintiff's allegation that the defendant companies reported such information to his prospective employers. The same is true of a newspaper article submitted by the Plaintiff, where a staff writer states that calls by her newspaper yielded similar results to those of the investigator's.

For all of the above reasons, both Chrysler and Compuware are entitled to summary disposition pursuant to MCR 2.116(C) (10) .

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Chrysler's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Compuware and Chrysler's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is granted.

IT IS FURTHER ORDERED AND ADJUDGED pursuant to MCR 2.602(A)(3) that this Opinion and Order resolves the last pending claims and closes the case.

RICHARD D. KUHN
RICHARD D. KUHN, CIRCUIT JUDGE

No. 05-430

NOV 2 - 2005

In The

Supreme Court of the United States

BILL BUTLER,

Petitioner,

v.

DAIMLER CHRYSLER CORPORATION and COMPUWARE CORPORATION, d/b/a PROFESSIONAL SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Has the Petitioner shown any compelling reason for review by this Court, where his claims have been fully considered, and rejected, by the Michigan trial courts, the Michigan Court of Appeals, the Michigan Supreme Court, the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit?

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE CASE

Petitioner filed a defamation action in the Oakland County Circuit Court, Case No. 00-022028-CL, asserting that Respondents gave false information to a prospective employer concerning his alleged prior employment with Respondents. Unfortunately for Petitioner, the prospective employer testified that it never contacted either of the Respondents to verify employment; instead, it selected another candidate who had previously worked for the company. After allowing Petitioner to amend his Complaint and providing him ample opportunity to articulate a claim, if he had one, the action was finally dismissed by the Oakland County Circuit Court on April 29, 2002.

Petitioner appealed as of right to the Michigan Court of Appeals. That appeal was denied on December 4, 2003. Petitioner then sought relief from the Michigan Supreme Court, which granted his request for immediate consideration, and denied his appeal on February 27, 2004. Presumably the reason the Michigan Supreme Court granted immediate consideration was because the Court was convinced there was no merit to the appeal and it could be readily addressed and dismissed.

Petitioner then sought to assert the very same claims in the United States District Court for the Eastern District of Michigan. A joint Motion to Dismiss was filed by Respondents. Following oral argument, where Petitioner was given an opportunity to present whatever facts and/or law he had to support his alleged position, Magistrate Judge Virginia M. Morgan issued her Report and Recommendation on July 30, 2004. The Magistrate concluded that the action should be dismissed, as Petitioner had had a full opportunity to litigate his claims in the state courts and

there was no legitimate claim he could assert against the Respondents. Petitioner filed Objections to these recommendations, which were considered by U.S. District Judge John Feikens, and rejected. A final order was issued by the court on August 27, 2004.

Petitioner subsequently appealed to the United States Court of Appeals for the Sixth Circuit. Evidently, Petitioner also asserted judicial misconduct claims against Judge Feikens and Magistrate Judge Virginia M. Morgan, for their failure to address, in writing, each specious argument he raised in oral argument. These claims were considered by the Judical Council for the Sixth Circuit and were properly dismissed. These claims are not properly raised before this Court.

Petitioner asserts that he did not get a full and fair opportunity to litigate his claims because both the state and federal courts rejected his arguments. However, Petitioner's disagreement with the decisions of the courts do not create a cause of action. Rather, it is clear that Petitioner's claims are fatally flawed, and must be rejected by the Court.

In reproducing the documents included in Petitioner's Appendix, there were numerous typographical errors, including missing sections of text. Therefore, the Order issued by the United States Court of Appeals for the Sixth Circuit is reproduced in its entirety in this response. Respondent reserves its objections to the numerous errors contained in the remaining documents.

ARGUMENT

This litigation has already spanned more than five (5) years. Having failed before the state trial courts, the Michigan Court of Appeals, the Michigan Supreme Court, the U.S. District Court for the Eastern District of Michigan and the Sixth Circuit, Petitioner now seeks further review of his claims. By application of the doctrine of *res judicata*, this Court is bound by the decisions of the Michigan courts, which fully considered Petitioner's claims and evidence and found that there are no genuine issues of fact and Respondents were entitled to judgment as a matter of law. Likewise, the U.S. District Court considered his arguments, and rejected them, finding that Petitioner's claims were precluded by *res judicata*. Petitioner's attempted reliance on "collateral estoppel" is misplaced; he does not understand that this legal theory is an affirmative defense, which requires that the Court apply the decision already made on the merits of this case. The unfortunate truth for the Petitioner is that the Respondents have done nothing to cause him harm, and he can articulate no legitimate claim against Respondent Compuware.

Petitioner's lack of understanding of the legal theories he is attempting to employ has required repeated responses from Respondents. Having lost all claims in the state courts, from the trial court all the way to the Michigan Supreme Court, the Federal district court and the Sixth Circuit he now seeks one last "bite at the apple" in this court. There is nothing left of that apple.

There is no question that it is time for this litigation to be concluded, once and for all. In support of its Argument, Respondent relies on the previous decisions issued

by the Oakland County Circuit Court, the Michigan Court of Appeals, the Michigan Supreme Court, the Report and Recommendations of Magistrate Judge Virginia M. Morgan, the Order Accepting Magistrate Judge's Report and Recommendation, and the Order of the United States Court of Appeal for the Sixth Circuit, all of which are part of the record in this matter.

CONCLUSION AND RELIEF

For all of the reasons stated above and in the Court's record, Respondent respectfully requests that this Court deny the Petition and bring this litigation to an end.

Respectfully submitted,

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Counsel for Respondent
Compuware Corporation

Dated: November 2, 2005

No. 04-2155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILL BUTLER, Plaintiff-Appellant, v. CHRYSLER CORPORATION; COMPUWARE CORPORATION, doing business as Professional Services, Defendants-Appellees.	)	ORDER

Before: BATCHELDER, GIBBONS and MCKEAGUE, Circuit Judges.

Bill Butler, a Michigan resident, appeals pro se a district court order dismissing a complaint he filed on the ground that it was barred by res judicata. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Butler filed this complaint, alleging that it was a "civil rights" action. According to the complaint, Butler was employed by defendants as a mechanical engineer until his firing in 1998. Subsequently, when seeking new employment, he alleged that defendants told prospective employers that he had never worked there, thus preventing him from obtaining a new job.

Defendants moved for dismissal of the complaint, arguing that it was barred by res judicata because Butler

had unsuccessfully pursued a defamation action in the Michigan state courts based on the same allegations. They submitted the decisions of the Michigan courts, which showed that they had been granted judgment because Butler provided no evidence that any prospective employer had failed to hire him based on defendants' refusal to acknowledge his employment. Butler pursued this case through the state court system to the Michigan Supreme Court.

This complaint was referred to a magistrate judge, who heard oral argument on the motion to dismiss and Butler's response. The magistrate judge's report and recommendation, after first stating that the motion to dismiss would be converted to a motion for summary judgment, recommended that the motion to dismiss be granted. The district court adopted this recommendation over Butler's objections. This appeal followed.

Initially, it is noted that, although Butler characterized this as a civil rights action, the named defendants could not be sued under 42 U.S.C. § 1983, as neither is a state actor. *Polk County v Dodson*, 454 U.S. 312, 318-19 (1981). The complaint also contained no allegations of employment discrimination on the basis of Butler's membership in a protected group, nor any indication that he had filed a charge with the E.E.O.C. and received a notice of the right to sue, in order to file a complaint of employment discrimination. *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989).

Moreover, even construing the complaint liberally as a diversity defamation claim, it was properly found barred by res judicata. Whether defendants' motion was construed as one for dismissal or summary judgment, decisions relying

on res judicata are reviewed de novo. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). This complaint was barred by res judicata because Butler had filed a prior action which was decided on its merits, raising the same issue against the same defendants. *Reithmiller v. Blue Cross & Blue Shield of Mich.*, 824 F.2d 510, 511 (6th Cir. 1987). Although Butler does not believe that his claim was fairly addressed by the state courts, an appeal from an unfavorable result in state court is not available in federal district court. *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 510 (6th Cir. 2000).

The district court's order is therefore affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

/s/
Clerk

4

No. 05-430

In the
Supreme Court of the United States

BILL BUTLER

v.

DAIMLERCHRYSLER CORPORATION AND
COMPUWARE CORPORATION D/B/A
PROFESSIONAL SERVICES

On Petition For Writ of Certiorari

To The UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REPLY BRIEF TO THE OPPOSITION BRIEF TO THE PETITION FOR WRIT OF CERTIORARI

BILL BUTLER
IN PRO SE
C/O JACKIE LeMON
28675 KARAM DRIVE
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(248) 227-1471

Are the petitioner's reasons explained in this reply brief, along with his petition, compelling for this court to grant a Writ of Certiorari in this case?

COMPELLING REASONS FOR GRANTING THE WRIT OF CERTIORARI

Pursuant to rule 15 paragraph 6 of the rules of the Supreme Court of the United States. The compelling reasons for granting the petitioner a Writ of Certiorari as seen in the eyes of the petitioner is as follows:

1. Unemployed since Oct 1998

   Due to this injustice, the petitioner has been rendered unemployable. No company would even consider the petitioner for employment at this point whether in this field of engineering or, any other field of work. Companies are very concern about potential employees that are involved in lawsuits because they think that will try to sue them and refuse to hire those employees.

2. The petitioner has been homeless for seven years.

   Since the petitioner has no been employed for the last 7 years He is unable to finically support himself. He has slept at relatives houses, in a tent in the woods, friends basements, and cheap hotels so far.

3. His credit is lost

   Not being able to pay his bills, all his credit is lost.

4. No medical or dental care for seven years.

   Two situations came up in which the petitioner had to emergency room at the hospital, in which he still has not paid the bill.

5. No transportation, his car lost due to no payments.

   He must ride a bicycle at all times, yes even thru the bitter cold of winter to get food to eat to survive.

6. Social Security contributions for the last 7 years lost.

7. Impossible to meet a woman and raise a family due to this devastating situation.

8. Court costs, photo copies and mailing fees are cover by 401k withdrawals, the petitioner was hit by a car with out on his bike getting court papers notarized in the early evening, receiving a small settlement from the insurance company, and some small home improvements jobs done for friends of the petitioner.

Conclusion

For the above compelling reasons the plaintiff-petitioner is driven and committed to this lawsuit. His livelihood, which he trained for as an engineer (2 years day school and 6 years night school), has been taken away by this injustice, which directly relates to his rest of life... These are the compelling reasons why the petitioner hopes the United States Supreme court will grant his petition for the Writ of Certiorari.

Bill Butler

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NOV 16 2005